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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

EVA LYNN HALL,

Plaintiff and Appellant,

v.

CATHOLIC HEALTHCARE WEST,

Defendant and Respondent.

A134984

(San Francisco County
Super. Ct. No. CGC-10-501922)

In this medical malpractice action, plaintiff Eva Lynn Hall appeals after the trial court granted the motion for summary judgment of Catholic Healthcare West doing business as St. Francis Memorial Hospital (the Hospital). The trial court granted the motion on alternate grounds: that the action was barred by the statute of limitations, and that Hall failed to raise a triable issue of fact after the Hospital shifted the burden to show that the treating physicians and radiologists were not its employees or agents and that the care plaintiff received was within the standard of care. Hall's contentions on appeal are limited almost exclusively to the question of whether she filed her action within the limitations period. We shall affirm the judgment.

I. BACKGROUND

Plaintiff gave the Hospital notice of her intent to sue on May 5, 2010 (Code Civ. Proc., § 364), and filed this action on July 27, 2010. The operative complaint is the second amended complaint, which names as defendants California Pacific Medical Center (CPMC), St. Francis Medical Hospital [*sic*], Dennis Shen, M.D., Ken Hammerman, M.D., and Wade Aubry, M.D., all of whom plaintiff alleged were agents or

employees of each other.¹ According to the second amended complaint, the Hospital was plaintiff's primary hospital beginning in October 2000, and its doctors diagnosed her with alcohol-related cirrhosis of the liver, rather than with the fatal liver disease she actually suffers from, Budd-Chiari Syndrome. Plaintiff alleged she was inappropriately treated for thyroid disease after one of the Hospital's radiologists diagnosed her with hyperthyroidism, a treatment that was "contraindicated to the underlying Budd-Chiari disease," that the Hospital's radiologists and other defendants concealed her medical history, and that she was misdiagnosed with cirrhosis. She alleged that her treating physicians, Dr. Shen, Dr. Aubry, and Dr. Hammerman, committed medical malpractice, reported falsely that her liver disease was the result of alcohol use, and removed documentation from her medical records. She also alleged defendants intentionally concealed their wrongful actions. According to the complaint, doctors at the University of California, San Francisco (UCSF), the Mayo Clinic, and Johns Hopkins Hospital later concluded plaintiff had a history of Budd-Chiari.

The Hospital moved for summary judgment on the grounds that the care and treatment the Hospital rendered were appropriate and within the standard of care and that plaintiff's claims were barred by the applicable statute of limitations. Its motion included a declaration from the Hospital's Director of Risk Services stating that all physicians who provided services to plaintiff were independent contractors with plaintiff, and were not employees or agents of the Hospital.

The motion for summary judgment included an expert declaration of Lorenzo Rossaro, M.D., a professor of medicine at the University of California, Davis School of Medicine, who had a clinical focus on diseases of the liver, including cirrhosis of the liver and Budd-Chiari Syndrome. Dr. Rossaro reviewed plaintiff's medical records from the Hospital, CPMC, Dr. Shen, Dr. Aubry, and other hospitals and health care providers, including the providers who had concluded plaintiff had a history of Budd-Chiari

¹ CPMC, Shen, Hammerman, and Aubry were not parties to the motion for summary judgment at issue in this appeal.

Syndrome. Based on this review, and on his education, training and experience, Dr. Rossaro opined that plaintiff “received appropriate evaluation, testing, monitoring, treatment, and recommended follow up” at the Hospital, that the Hospital had “at all times complied with the standard of care in the medical community,” and that “no act or omission to act on the part of [the Hospital] caused or contributed to the injuries of the plaintiff, Eva Hall.” Dr. Rossaro explained in detail the basis for his opinion: plaintiff’s illness and symptoms were consistent with alcoholic liver disease, and her records showed a history of heavy drinking. He opined that “[n]one of [plaintiff’s] test results were diagnostic of Budd-Chiari disease. To the contrary, and especially given her history of treatment related to significant alcohol intake at St. Francis Memorial Hospital, as well as other hospitals, it is more likely than not to a reasonable medical probability that she does not have Budd-Chiari. To the contrary, the vast majority of the evidence points to a pathognomonic presentation of alcoholic liver disease.” Dr. Rossaro also noted that plaintiff’s condition had “improved remarkably after she began abstaining from alcohol in December in 2005,” which would be consistent with a diagnosis of alcohol-related liver disease, but inconsistent with Budd-Chiari Syndrome. It appeared to Dr. Rossaro that plaintiff had not provided her full medical and social history to the doctors who later diagnosed her with Budd-Chiari, that she had reported to those physicians that she already had a diagnosis of Budd-Chiari, and that they therefore were “evaluating her with a presumed previous diagnosis of Budd-Chiari.”

The Hospital provided evidence that on September 19, 2008, plaintiff requested her medical records from the Hospital for the period May 2006 to January 2007, and was provided with 157 pages of documents a few days later. On November 19, 2008, she requested all of her medical records from 2000 till 2008 and 1994, and the following month she received 631 pages of documents. Plaintiff testified in her deposition that she made the requests because her laboratory tests results “all of a sudden” were “unremarkable,” and she “want[ed] to find out what was wrong with [her].” In response to the question, “So it sounds like you were concerned that there was something that they were missing that they weren’t telling you,” she replied, “Well, yeah.”

In opposition to the Hospital's motion for summary judgment, plaintiff did not submit any expert testimony that the care she had received at the Hospital fell below the applicable standard of care or that any such breach of the duty of care caused her injury. Rather, she provided unauthenticated records of her consultations with other doctors and clinics, including UCSF, Johns Hopkins Bayview Medical Center and the Mayo Clinic, indicating she had a history of Budd-Chiari Syndrome, and that she might have a variant of Budd-Chiari Syndrome. She also submitted her own declaration, according to which four doctors at other facilities diagnosed her with Budd-Chiari between September 2010 and November 2011, doctors at the Hospital had failed to rule out or diagnose her with Budd-Chiari, and she had been advised that had Budd-Chiari been diagnosed, she would have been treated differently for a thyroid condition she developed in 2003. She learned of her condition through her own research on a medical site on the internet, and "her suspicions of Budd-Chiari came to light on May 21, 2009."

Plaintiff asserted in her declaration that the Hospital and doctors removed or concealed medical records that would have shown she suffered from Budd-Chiari Syndrome, and fabricated a diagnosis of cirrhosis in order to conceal their own errors. Plaintiff averred her medical history showed only limited alcohol consumption, and that due to the false diagnosis of cirrhosis she had been found ineligible for a transplant. Her declaration included detailed information about her medical history and hospitalizations.

Plaintiff also submitted a "Separate Statement of Triable Issues" in opposition to the summary judgment motion, which was largely devoid of citations to evidence. In it she stated that the Hospital did not meet the appropriate standard of care.

The trial court granted the motion for summary judgment, ruling: "Plaintiff's complaint is barred by the one-year statute of limitations set forth in Code of Civil Procedure [section] 340.5. The statute of limitations began to run on November 19, 2008, the date of Plaintiff's written request to Defendant for all medical records, including radiology, when Plaintiff knew or should have known of Defendant's asserted

wrongdoing. Moreover, Defendant shifted the burden to show that all of Plaintiff's treating physicians and radiologists were not employees or agents of Defendant during the relevant time period and that Defendant's care was reasonable, appropriate, timely and well within the standard of care. Plaintiff fails to raise a triable issue on these matters."

II. DISCUSSION

A. Legal Standards on Summary Judgment

"We review a grant of summary judgment de novo. [Citation.] In performing our de novo review, we employ a three-step analysis. 'First, we identify the issues raised by the pleadings. Second, we determine whether the movant established entitlement to summary judgment, that is, whether the movant showed the opponent could not prevail on any theory raised by the pleadings. Third, if the movant has met its burden, we consider whether the opposition raised triable issues of fact.' [Citations.] To shift the burden, the defendant must conclusively negate a necessary element of the plaintiff's case or demonstrate there is no triable issue of material fact requiring a trial. [Citation.] If the evidence does not support judgment in the defendant's favor, we must reverse summary judgment without considering the plaintiff's opposing evidence. [Citation.] Any evidence we evaluate is viewed in the light most favorable to the plaintiff as the losing party; we strictly scrutinize the defendant's evidence and resolve any evidentiary doubts or ambiguities in the plaintiff's favor. [Citation.]" (*Barber v. Chang* (2007) 151 Cal.App.4th 1456, 1462–1463, italics omitted.)

Evidence submitted in support of and in opposition to motions for summary judgment must be admissible. (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761 (*Bozzi*). "Declarations must show the declarant's personal knowledge and competency to testify, state facts and not just conclusions, and not include inadmissible hearsay or opinion. [Citations.] . . . Only *admissible evidence* is liberally construed in deciding whether there is a triable issue." (*Ibid.*)

B. The Merits

As we have noted, the trial court granted summary judgment on the alternate grounds that plaintiff's complaint was barred by the statute of limitations and that defendant had shifted the burden to show that the physicians and radiologists were not the Hospital's employees or agents and that the care the Hospital provided was within the standard of care. In her opening brief on appeal, plaintiff directly challenges only the trial court's ruling on the statute of limitations, and provides no legal authority to challenge these alternate bases for the trial court's ruling.² (See *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 372 ["an appellant must 'state each point under a separate heading or subheading summarizing the point, and support each point by argument' "].) It is well established that the trial court's judgment is presumed to be correct, and it is the appellant's burden to show prejudicial error. (*Cypress Security, LLC v. City and County of San Francisco* (2010) 184 Cal.App.4th 1003, 1014; *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.) Plaintiff has failed to do so here. With respect to the alternate grounds for the trial court's ruling, plaintiff's treatment of them in her reply brief is utterly lacking in reasoned argument and citations

² The subsections of the "Argument" portion of her opening brief are headed: "A. The Second Amended Complaint Alleges Facts Sufficient to Avoid the Three-Year Time Bar Under Code of Civil Procedure § 340.5. [¶] 1. Allegations of fraud are sufficient to toll the three-year limitations period. [¶] 2. Appellant's cause of action did not accrue for purposes of the three-year limitations period until May 21, 2009. [¶] B. The Second Amended Complaint Alleges Facts Sufficient to Avoid the One-Year Time Bar Under Code of Civil Procedure § 340.5. [¶] C. The Second Amended Complaint Alleges Facts Sufficient to Avoid the Three-Year Time Bar Under Code of Civil Procedure § 338(d). [¶] D. Even If The Second Amended Complaint Fails To Properly Allege Any Cause Of Action, The Trial Court Abused Its Discretion By Failing To Grant Appellant Leave To Amend." The final section of the opening brief is headed, "Appellant Has Suffered a Miscarriage of Justice and Has Been Prejudiced by the Trial Court's Error."

to authority; accordingly, they are waived. (See *People v. Dixon* (2007) 153 Cal.App.4th 985, 996; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785.)³

In any case, even if we were to treat the alternate grounds for the grant of summary judgment as properly challenged, we would affirm the judgment on the basis that plaintiff failed to create a triable issue on whether there was malpractice. “An expert declaration is admissible to support or defeat summary judgment if the expert’s testimony would be admissible at trial in accordance with Evidence Code section 720. . . . [¶] When the moving party produces a competent expert declaration showing there is no triable issue of fact on an essential element of the opposing party’s claims, the opposing party’s burden is to produce a competent expert declaration to the contrary.” (*Bozzi, supra*, 186 Cal.App.4th at pp. 761–762.) This rule has particular application in the medical malpractice context. It is well established that, “where the conduct required of a medical professional is not within the common knowledge of laymen, *a plaintiff must present expert testimony to prove a breach of the standard of care.*” (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 509, italics added.) Moreover, in medical malpractice cases, “the standard of care, when testified to by experts who are uncontradicted, may be conclusively shown by such testimony.” (*Conservatorship of McKeown* (1994) 25 Cal.App.4th 502, 509.)

It is beyond dispute that the complexities of the distinctions between cirrhosis and Budd-Chiari Syndrome, the propriety of each diagnosis in plaintiff’s case, and the proper treatment, are not within the common knowledge of laymen.⁴ In connection with this

³ We note that plaintiff has appeared in propria persona both in the trial court and on appeal. Self-represented litigants are held to the same standards as attorneys. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543.)

⁴ For example, the second amended complaint alleged: “[The Hospital’s] radiologists failed to indicate the same Budd-Chiari characteristics from 2000, i.e., poorly visualized hepatic veins, hepatic infarcts, IVC compression, and fatty infiltration to some portions of the liver [later] confirmed to be a history of Budd-Chiari By comparison to the 2001 CT, the left lobe and midsection of the liver were spared portions with a

issue, defendant submitted the expert declaration of Dr. Rossaro, who testified to his expertise in the field of diseases of the liver, including cirrhosis and Budd-Chiari Syndrome, established that he had reviewed plaintiff's medical records and deposition testimony, opined that the care and treatment the Hospital provided to plaintiff at all times complied with the standard of care in the community and that the Hospital's actions or omissions did not cause or contribute to her injuries, and explained the medical basis for his opinion. We agree with the trial court that this showing was sufficient to shift the burden to plaintiff to show the Hospital breached the standard of care and thereby caused plaintiff injury.

Plaintiff was therefore required to present expert testimony to prove a breach of the standard of care and resulting harm. Neither the unauthenticated medical records plaintiff produced nor her own declaration constitutes expert testimony either that the care the Hospital provided fell below the applicable standard of care or that she suffered any resulting injury. Accordingly, the trial court properly granted summary judgment in the Hospital's favor.⁵

benign, strand-like mass to the right lobe enlargement. The biopsy was significant for a fatty liver of nonalcoholic origin . . . [¶] . . . The [Hospital's] radiologists failed to diagnose Budd-Chiari by comparison of the 2002 CT and ultrasound/CPMC reporting displaced veins and hepatic infarcts. Plaintiff exhibited severe ascites, edema, right lobe and caudate lobe enlargement compressing the IVC, and an enlarged spleen, all indicative of Budd-Chiari disease, or at least suspicion thereof, and yet [the Hospital] failed to make this diagnosis in late 2003. The 11/03 CT evaluation by Dr. Herlong in 11/10 reported the left lobe had atrophied due to congestion even though the plaintiff showed no signs of decompensation and had consistent and normal bilirubin and platelets throughout 2003."

⁵ The Hospital objected to the medical reports, in part on the grounds they constituted inadmissible hearsay, were not authenticated, and lacked foundation, and to many of the statements in plaintiff's declaration in part on the grounds they contained inadmissible hearsay and opinion testimony. It appears the trial court did not rule on these objections. Even assuming this evidence is admissible, we conclude the trial court properly concluded plaintiff failed to meet her burden.

Because we reach this conclusion, we need not consider the propriety of the trial court's alternate conclusion that the action was barred by the statute of limitations.

C. Procedural Issues

Plaintiff contends the trial court abused its discretion by not granting her leave to amend her complaint. Her argument appears to be made under the misapprehension that the standards governing demurrers or motions for judgment on the pleadings are applicable to motions for summary judgment. Moreover, although plaintiff indicated in her briefing below that she intended to request "time to amend her complaint and a continuance as to [the Hospital] and all defendants," she fails to establish that she actually made such a request. Plaintiff has not met her burden to show an abuse of the trial court's discretion.

In what appears to be a variation on this argument, plaintiff contends the trial court abused its discretion in not granting her a continuance under Code of Civil Procedure section 437c, subdivision (h), which provides in part: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just." Under this provision, "[w]here the opposing party submits an adequate affidavit showing that essential facts may exist but cannot be presented timely, the court must either deny summary judgment or grant a continuance." (*Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 34.) Plaintiff has not shown that she submitted affidavits making this showing or that the trial court abused its discretion in failing to order a continuance.

III. DISPOSITION

The judgment is affirmed.

Rivera, J.

We concur:

Ruvolo, P.J.

Humes, J.